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No. 79-972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONERS WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA AND GEORGIA-PACIFIC CORPORATION

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MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

The Mead Corporation ("Mead"), through undersigned counsel and pursuant to Rule 36 of the Rules of the United States Supreme Court, moves the Court for permission to file a brief amicus curiae in *Westvaco Corporation, et al.* v. *Adams Extract Company, et al.*, No. 79-972. Grounds for this motion are:

1. This Court has granted the petition for certiorari of Westvaco Corporation ("Westvaco"), Packaging Cor-

poration of America ("Packaging Corporation"), and Georgia-Pacific Corporation ("Georgia-Pacific"), defendants in the *Corrugated Container Antitrust Litigation*, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution and claim reduction in antitrust cases. Mead is also a defendant in this litigation. Indeed, Mead and Westvaco are the only two defendants in M.D.L. 310 which did not settle the class action cases, which are currently in trial, and are most directly affected by the contribution issue.

2. On December 7, 1978, Westvaco moved for leave to amend its answer to the complaint in M.D.L. 310 to assert cross-claims for contribution. On March 1, 1979, Westvaco filed an amended motion to assert cross-claims for contribution and an affirmative defense of claim reduction. Packaging Corporation and Georgia-Pacific filed similar motions. On May 16, 1979, the district court denied the motions. On October 30, 1979, the Court of Appeals for the Fifth Circuit summarily affirmed the district court's denial of the motions for contribution and dismissed the appeals with respect to claim reduction. The court, without analysis, accepted as controlling authority its recent decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. pending sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980), in which the Fifth Circuit held that there were no rights of contribution for antitrust defendants.

3. While petitioners filed motions to assert contribution by way of cross-claims and to assert claim reduction by way of an affirmative defense in the district court below, Mead filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civ. No. 4-79-245, alleging the same rights of contribution and claim reduction sought by petitioners. The Judicial Panel on

Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). Subsequently, plaintiffs filed a motion to dismiss which the district court granted on December 21, 1979. Thereafter, on January 2, 1980, Mead filed a motion for reconsideration, but the district court has never ruled on that motion. Accordingly, no final appealable order was entered by the district court from which Mead could appeal. But for the absence of a final appealable order, Mead would also be a petitioner on this appeal before this Court.

4. Because Mead's interests in the contribution issue pending before this Court are identical to petitioners', Mead is entitled to the benefit of this appeal. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980).

5. Thus, Mead has a legitimate and vital interest in the appeal before this Court. *The Employers' Liability Cases*, 207 U.S. 463 (1908); *Northern Securities Co.* v. *United States*, 191 U.S. 555 (1903); *The Grey Jacket*, 72 U.S. 370 (1866); *Florida* v. *Georgia*, 58 U.S. 478 (1855). *See also Strasser* v. *Doorley*, 432 F.2d 567 (1st Cir. 1970).

6. Mead believes the arguments to be presented on its behalf to this Court are material and germane to consideration of this important issue under the federal antitrust laws, and to the right of Mead to contribution and claim reduction under those laws, and respectfully submits that its arguments should be presented to and considered by this Court.

7. Mead has been unable to obtain the consent of all parties involved in *Westvaco Corporation, et al.* v. *Adams Extract Company, et al.* to the filing of an amicus curiae brief, thus necessitating this motion.

For the reasons stated above, The Mead Corporation moves the Court for permission to file a brief amicus curiae in this matter.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONERS WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA AND GEORGIA-PACIFIC CORPORATION

The Mead Corporation ("Mead") submits this brief as amicus curiae in support of petitioners Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation"), and Georgia-Pacific Corpo-

ration ("Georgia-Pacific"). Mead respectfully submits that this Court should hold that defendants may assert rights of contribution and claim reduction in antitrust cases.

INTEREST OF AMICUS CURIAE

Mead is one of 37 corrugated container manufacturers named as defendants in one or more of over 60 treble damage antitrust class and nonclass actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). Mead is one of two nonsettling defendants in the class actions of M.D.L. 310 and, along with Westvaco, is currently in the trial of the class actions in that multidistrict action.

On September 6, 1978, the district court, purportedly under Rule 23 of the Federal Rules of Civil Procedure, certified a national class of all purchasers of corrugated containers or corrugated sheets from defendants from January 1, 1960 to January 25, 1978, estimated to include 300,000 members. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

Thereafter, and as a direct result of that class certification, plaintiffs engaged in an unprecedented five-week settlement "stampede" from late December 1978 to January 1979, which resulted in 24 defendants collectively paying more than $288 million in 22 separate settlements. With each successive settlement, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. Plaintiffs were able to escalate their settlement demands by refusing to remove the sales of settling defendants from the litigation. As a result, plaintiffs threatened each remaining nonsettling defendant with exposure to damage claims based upon the sales of each settling defendant.

Without rights of contribution or claim reduction, plaintiffs claim that Mead and Westvaco, each having approximately 2½% of the market, nevertheless face potential damage claims in M.D.L. 310 based upon industry-wide sales.

Mead has the identical interest in the outcome of this appeal as petitioners. The only reason Mead is not a petitioner in this matter is because the district court below has never entered a final appealable order dismissing its separate complaint for contribution and claim reduction. It is well established that a non-appealing defendant may benefit from an appeal taken by other defendants. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980).

SUMMARY OF ARGUMENT

M.D.L. 310 not only represents one of the largest antitrust cases in history, but also represents the most egregious abuse of the class action device to date. The absence of rights of contribution and claim reduction among antitrust defendants has resulted in coercive escalation settlement tactics by plaintiffs and a blatant perversion of Rule 23 of the Federal Rules of Civil Procedure. The escalation settlements extracted by plaintiffs in this case conclusively demonstrate the fundamental necessity for rights of contribution and claim reduction in antitrust cases. In the absence of such rights, an innocent defendant is relegated to the unacceptable choice of trying a lawsuit with potential multibillion dollar damage exposure or agreeing to an extortionate settlement on a take it or leave it basis.

Rights of contribution and claim reduction among antitrust defendants will (1) eliminate the manifest unfairness of coercive escalation settlements to nonsettling defendants, (2) prevent the most culpable defendants

from escaping significant liability through "sweetheart" settlements, and (3) increase the deterrence of the antitrust laws. Recognition of rights of contribution and claim reduction among antitrust defendants would proportion liability and ultimately damages to relative culpability, market size and other legitimate factors. The settlement process would not be exploited by coercion, and settling and nonsettling defendants alike would not be victimized by the happenstance of a successive escalation settlement timetable bearing no relationship to any individual defendant's culpability. The confluence of joint and several liability, class certification, and treble damages compels that rights of contribution and claim reduction be recognized in antitrust cases.

ARGUMENT

I. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH HAS OCCURRED IN THIS CASE

Although settlements in antitrust cases have been historically favored, plaintiffs' settlement tactics in this case have completely perverted the settlement process and have "upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 459 (2d Cir. 1974). Recognition of contribution and claim reduction among antitrust defendants would not only eliminate settlement coercion, but would also restore the delicate settlement balance which has been destroyed by plaintiffs in this case. Furthermore, the availability of contribution would prevent the negotiation of "sweetheart" settlements in which more culpable defendants

settle early and cheaply to the detriment of the remaining firms.[1]

A. The Settlement History

Plaintiffs negotiated the settlements in this case based on market share or "points." Points equal an individual defendant's percentage of all defendants' sales of corrugated containers and sheets.[2] Plaintiffs classified defendant corporations into three groups—felony indictees, misdemeanor indictees, and unindicted corporations—and negotiated successive settlements with each corporation in each group, as illustrated in the following table.[3]

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[1] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 72 (1979) (statement of Robert P. Taylor, Director, ABA Task Force on Contribution).

[2] Defendants in this case account for approximately 75% of the total industry sales. Thus, settlement market share points represent approximately 1.33 times each defendant's actual total market share.

[3] The table reflects plaintiffs' grouping and the settlement of each corporation in each group in chronological order, expressed in terms of millions of dollars per point of market sales. Thus, as shown in the table, International Paper with 8.3% of the market settled for 1.0 per point, or $8.3 million.

Company	Amount Per Point ($ million)	Market Share	Settlement Date
FELONY INDICTEES			
International Paper	1.0	8.3	8-24-78
Champion	4.5	5.36	12-18-78
Weyerhaeuser	5.0	7.83	1- 6-79
Owens-Illinois	6.0	5.45	1-12-79
Olinkraft	6.0	1.22	1-12-79
Continental Group	6.5	4.22	1-16-79
MISDEMEANOR INDICTEES			
Boise Cascade	3.5	2.82	12-18-78
Container Corp.	4.0	8.56	1- 6-79
Inland Container	4.75	7.29	1-18-79
Stone Container	4.75	3.05	1-18-79
St. Joe Paper Co.	4.75	2.62	1-18-79
UNINDICTED COMPANIES			
St. Regis Paper Co.	.5	3.97	7-21-78
Union Camp	2.0	3.7	12-13-78
Diamond International	2.0	.5	12-14-78
Dura Container	2.0	.37	12-14-78
Chesapeake Corp.	2.4	1.26	12-18-78
Longview Fibre	2.5	2.58	12-18-78
Williamette Industries	2.7	4.18	12-18-78
Menasha Corp.	2.75	1.67	12-18-78
MacMillan-Bloedel	4.0	2.11	12-18-78
U.S. Corrugated	4.0	.76	1-25-79
Green Bay Packaging	3.25	1.71	1-25-79

This chronology demonstrates that plaintiffs required each successive settling defendant within each group to pay an ever greater amount in proportion to its sales of corrugated containers and sheets than the preceding defendant in its group. Plaintiffs' ability to coerce successive escalation settlements from individual defendants in each group rested on the simple but pernicious fact that as each successive settlement was reached, plaintiffs claimed that the potential damage exposure to each de-

fendant which had not yet settled would increase by geometric proportions.[4] Plaintiffs obtained ever greater

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[4] The Senate Judiciary Committee described the exploding potential liability on nonsettling defendants:

> "The *Corrugated Container* litigation provides an excellent example for illustrating how today's vast damage claims are used unfairly to 'whipsaw' settlements . . . . Apparently because of the large number of defendants and the disparity in the size, market share, and involvement in the alleged conspiracy, no sharing agreement existed. This, combined with the unavailability of contribution, made possible a classic example of what one witness called the whipsaw 'game theory' in application.
>
> "The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at $500,000 per percentage point of market share, and the second at $1 million. The second settlement was the more significant, for it was with a defendant which had the second largest market share (8.3%) and which was to plead nolo contendere in the criminal case. The $8.3 million settlement was clearly beneficial to the defendant because its potential liability for its own sales alone ranged from $50 to $250 million, and its total potential liability for the industry's sales ranged from over $250 million to well over $3 billion—depending on the damage estimate used.
>
> "The sum deducted from the potential liability facing the other 35 defendants was only $8.3 million, however, not the $50-250 million traceable to the settling defendant's own sales. Since this defendant was now protected from having to share in paying off that sum, the liability of the other defendants thus increased for all practical purposes by that amount overnight. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled."

S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979).

leverage in each succeeding settlement negotiation without regard to the probability of class recovery against that individual corporation.[5]

The Third Circuit in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979), noted that "courts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." Here, as a result of plaintiffs' settlement tactics, plaintiffs claim that Mead and Westvaco remain potentially liable for 100 percent of any damages in M.D.L. 310 even though they account for less than 5 percent of the corrugated container industry's sales because the market shares of the defendants who settled were not withdrawn from the case.[6] In fact, plaintiffs demanded during all settlement negotiations the nonnegotiable term that settling defendants' market shares remain in the lawsuit. Of course, in the absence of contribution, the settling defendants also had no incentive to remove their market shares from the lawsuit.

B. The Settlements Are Extortionate

The extortionate nature of the successive escalation settlement agreements in M.D.L. 310 becomes readily apparent upon analysis, as demonstrated by the following examples:

1. International Paper, the first of the felony indictees to settle, bought its peace for $8.3 million, or approxi-

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[5] If this scenario were carried to its logical conclusion, a nonsettling defendant with a 1% market share could, if all other defendants settled, be potentially liable for damages based upon 100% of an industry's sales.

[6] Plaintiffs admitted that each settling defendant "agreed to leave its sales in the lawsuit, thus making nonsettling defendants potentially liable for the full damage of the conspiracy." Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, at 34.

mately $1.0 million per "point." Continental Group, the last of the felony indictees to settle, paid $27,430,000, or $6.5 million per "point," the highest rate of any settling defendant and six and one-half times greater than International Paper. International Paper, a company with twice Continental's market share, was permitted to settle for less than one-third of Continental's settlement simply because of its early position in the escalation timetable. If Continental had settled at $1 million per point, as did International Paper, its settlement would have been $4,220,000, not $27,430,000. This $23 million difference bears no relationship to relative culpability—International Paper pleaded *nolo contendere* whereas Continental pleaded not guilty and *was acquitted at the criminal trial* —or to the merits of plaintiffs' claims—both settlements were concluded before any significant civil discovery commenced. The Continental settlement is plainly and simply attributable to the enormously increased liability that plaintiffs claimed faced Continental as a result of prior settlements. After the International Paper and St. Regis settlements, the remaining defendants who had not settled accounted for approximately 88 percent of defendants' sales. By the time Continental settled, however, the nonsettling defendants accounted for less than 40 percent of defendants' sales. Continental's increased damage exposure under plaintiffs' theory was created because no claim reduction was included in any of the preceding settlements and there was no right of contribution among defendants.

2. Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to International Paper, it paid $34.2 million, or more than four times the amount paid by International Paper, a felony indictee.

3. Although U.S. Corrugated Fibre-Box was not indicted and had the smallest market share of all defend-

ants, it settled at a rate eight times higher than St. Regis and four times higher than International Paper.

4. Even though petitioner Georgia-Pacific was identified in the criminal cases as a *victim* of the alleged conspiracy, it was forced to settle with plaintiffs for $3 million. Thus, the absence of contribution allowed *plaintiffs* to victimize Georgia-Pacific.

5. The final settlement negotiated before the criminal verdict conclusively demonstrates the extortionate nature of the M.D.L. 310 settlements. George Kress, founder and president of Green Bay Packaging Co., Inc. ("Green Bay"), testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Monopoly, and Business Rights concerning the Green Bay settlement. Mr. Kress testified that Green Bay, which was neither indicted nor named as an alleged co-conspirator, had decided to prove its innocence at trial in M.D.L. 310. After defendants having over 80 percent of sales settled, Green Bay learned that it could settle the case for $3.7 million per point, or 7.5 times the St. Regis settlement, on a take it or leave it basis. At this point, Green Bay calculated its potential liability in M.D.L. 310 to be $5 billion under plaintiffs' theory, an amount which not only would bankrupt Green Bay but also would immediately destroy its ability to borrow capital in financial markets.[7] Green Bay reluctantly settled at the amount demanded by plaintiffs only after the full impact of its potential liability became apparent. As Mr. Kress testified:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over fifty years of effort and coerced into paying an ex-

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[7] *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 33-34 (1979).

> orbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[8]

The district court recognized the inherent coerciveness of the escalation settlements in M.D.L. 310:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable . . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.* (Emphasis added.)[9]

What the district court acknowledged has become commonplace in antitrust class actions. *See, e.g., Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Shapiro* v. *General Motors Corp.*, 472 F. Supp. 636, 660 (D. Md. 1979); *Arth Main Street Drugs* v. *Beer Distributors, Inc.*, 26 F.R. Serv.2d 87 (N.D. Ind. 1978); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Alsup* v. *Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972).

Furthermore, plaintiffs' "whipsaw tactics"[10] in this case are even more objectionable than the "most favored nations" clause, the use of which in class action settlements has been consistently condemned by federal courts and the *Manual For Complex Litigation.* In each instance, not only can it be anticipated that a defendant

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[8] *Id.* at 35.

[9] Memorandum Opinion, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (May 30, 1979).

[10] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979).

whose guilt is clearest or whose pocket is deepest will settle early, but also a floor (or a built-in escalation factor) can be created for subsequent negotiations which has no bearing on the probability of class recovery against that defendant.

> As a result, a trial may be forced which nobody wants under circumstances in which all concerned, including the court, agree that a smaller settlement with the late-settling defendants would be fair and reasonable.

Manual For Complex Litigation, § 1.46 at 63. This is precisely the situation in this case. Mead faced an unacceptable choice: either capitulate to escalation settlement tactics amounting to "legalized blackmail" or go to trial and risk exposure under plaintiffs' theory to an inordinate and exorbitant judgment for damages based upon not only its own market share but also the market shares of all other defendants who had previously settled.

II. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Without a right to contribution among antitrust defendants, the class action provisions of Rule 23 of the Federal Rules of Civil Procedure combined with the rule of joint and several liability in civil damage actions and the mandatory treble damage remedy of Section 4 of the Clayton Act, 15 U.S.C. § 15, permit class plaintiffs to coerce settlements in antitrust class actions without regard to the merits of their claims. As the Third Circuit cautioned in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979): "Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." *Id.* at 586-87.

Federal courts have expressed increasing concern that the aggregation of damage claims in class actions may coerce settlements from defendants and force them to abandon meritorious defenses. Thus, this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S 463 (1978), observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

Id. at 476. In *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977), the court acknowledged that the enormous risk of classwide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not." *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The need for contribution among antitrust defendants to strike an appropriate balance in the settlement process and to protect nonsettling defendants from disproportionate liability has become even more acute with the proliferation of class actions.[11]

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[11] *See The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 19 (1979) (testimony of John Shenefield, Assistant Attorney Gen., Antitrust Div., Dept. of Justice); *id.* at 76 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 11 (1979) ("[T]he problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966. . .")

M.D.L. 310 vividly demonstrates that "unless prudence and caution are exercised by the Bench and Bar, the Class Action device can be transformed from a useful tool to an *engine of destruction.*" (Emphasis added.)[12] The absence of contribution among antitrust defendants will continue to permit plaintiffs to use class certification to coerce unjust settlements and to transform Rule 23 into a "Frankenstein monster." [13] This harsh epithet is frightfully apropos to that which has occurred in M.D.L. 310. It is precisely the abuse of Rule 23 engineered by plaintiffs in M.D.L. 310 that recognition of contribution among antitrust defendants would guard against. The right of contribution would deter only "unfair settlements based on the risk of massive liability, without regard to culpability or damage caused." [14]

The rule against contribution has long been criticized by commentators precisely for its coercive effects on set-

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[12] Oral Opinion in *Smith* v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J.), *quoted in* American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, III (1972).

[13] *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting).

[14] ABA, Antitrust Section, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, 8 (September 6, 1979), *reprinted in*, 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) ("Plaintiffs' lawyers have testified that [contribution] will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of [contribution] would simply be to lessen the coercive nature of some of the plaintiffs' lawyers negotiations, and that the only settlements [contribution] will discourage in the long run are those it is intended to discourage—namely coerced settlements").

tlements in antitrust class actions.[15] The class action device, unfettered by contribution among antitrust defendants, permits plaintiffs to aggregate trivial claims "into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction." [16] Recently, the absence of contribution in antitrust class actions was criticized "because of the possible overwhelming liability of one company for the damages of an entire conspiracy and of the ability of plaintiffs to coerce settlements from defendants who fear that liability." [17]

The certification of a large antitrust class action without rights of contribution among defendants gives rise to such tremendous pressures to settle before trial that the class action device has been aptly characterized by Professor Handler as a form of "legalized blackmail":

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been *de facto* deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The

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[15] Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111 (1962); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 Fordham L. Rev. 67 (1972); *see also Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979 (1980).

[16] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976).

[17] *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980).

only significant issue becomes the size of the ransom to be paid for total peace.[18]

Thus, there is enormous settlement pressure even on innocent defendants.[19] Defendants are compelled to settle from fear of liability for the damages of an entire alleged conspiracy.[20]

Furthermore, when the potential damage exposure of a class action exceeds the net worth of a corporate defendant, the possibility of corporate destruction becomes

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[18] Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 Columbia L. Rev. 1, 9 (1971).

[19] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976) ("No matter how sincere is [defendants'] belief in the innocence of their acts, they have little practical alternative but to settle, and certainly no alternative but to join in any settlement by [other defendants] or be left with a potential liability measured by the total damages a jury might find, trebled, less only the settlement amounts"); *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before The Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution) (estimates of potential liability for a "completely foundationless suit" range from 5% to 25%).

[20] *Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979, 995 (1980) ("[C]ontribution eliminates coercive or 'whipsaw' settlements in large cases. For example, in *In re Corrugated Container Antitrust Litigation* defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" claimed by plaintiffs) (footnote omitted); *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before The Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 68 (1979) (statement of Donald Kempf) ("[T]he practicalities of the situation are such that, increasingly, businessmen are concluding that they have no real option but to settle such antitrust claims, even when they are confident that they did nothing wrong and have a solid defense").

real. Corporate management naturally tends to seek insurance against whatever remote chance of success plaintiffs may have. The settlement agreement becomes the corporation's life insurance policy, and the amount of settlement, its premium. Thus, "any settlement within [defendants'] purse, as a practical matter, may be their only chance for survival." [21]

Over the years, eminent plaintiffs' counsel have acknowledged the coercive effects of class certification by underscoring that such actions are invariably settled:

> *I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class.* . . . When two very competently represented and major litigants have settled, I think it shows this. It shows that the problem is manageable. It shows that they feel that *this is the way that the litigation can be disposed of by settlement, namely, by having a class*; whereas, if there were no class, it would not be disposed of by settlement. *So I think that you sow the seed for the possibility of a settlement.* (Emphasis added.) [22]

Furthermore, the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974), astutely predicted that injustices would occur when the class action device is misused to extract settlements from antitrust defendants who are not entitled to contribution:

> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even

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[21] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

[22] *City of Philadelphia* v. *American Oil Co.*, Civ. No. 647-68 (D.N.J.), Transcript of Proceedings, 11 (March 1, 1971).

> for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner. *Id.* at 1019.

As demonstrated above, this is precisely what happened in M.D.L. 310 without the right of contribution among defendants. The abuses to which Rule 23 is susceptible can be effectively eradicated by this Court's recognition of rights of contribution and claim reduction among antitrust defendants.

Not only has the lack of contribution rights allowed class plaintiffs in M.D.L. 310 to subvert the settlement process, but the extortionate settlements obtained through the mechanism of class certification have, in effect, rewritten substantive provisions of the antitrust laws.[23] Section 4 of the Clayton Act, 15 U.S.C. § 15, limits the recovery of treble damages to those who can prove an injury to their business or property by reason of a violation of the antitrust laws.[24] With contribution unavailable among antitrust defendants, plaintiffs in M.D.L. 310 have grossly distorted these substantive provisions by using the class action device to coerce settlements which have no bearing whatever either to the actual damages

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[23] Rule 23 is a rule of procedure which does not alter substantive statutory provisions. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

[24] This principle was affirmed by this Court in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), which held that recovery in a private antitrust action is limited to *actual* damages trebled: "In enacting [the antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation." *Id.* at 262.

which may have been suffered by class plaintiffs or to the relative culpability of each settling defendant. Thus, without contribution, antitrust class actions permit plaintiffs to shift private antitrust policy from compensation to confiscation. And the larger the stakes, the greater the incentive for plaintiffs to attempt to do just that, as has been accomplished by plaintiffs in M.D.L. 310.

CONCLUSION

For the foregoing reasons, The Mead Corporation respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit rights of contribution and claim reduction.

Respectfully submitted,

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